In The

Supreme Court of the United States

October Term 1975

No. 75-1861

GORDON G. PATTERSON, JR.,

Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the
New York Court of Appeals

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant Gordon G. Patterson, Jr., appeals to this Court from the judgment and order of the New York Court of Appeals entered on April 1, 1976, which affirmed Appellant's conviction for murder and submits this statement to show that the Supreme Court of the United States has jurisdiction of the Appeal and that a substantial federal question is presented.

OPINION BELOW

The opinion of the New York Court of Appeals was rendered on April 1, 1976. *People v. Patterson*, 39 N.Y.2d 288 (1976). The opinion is attached hereto as Appendix A. No other opinions were rendered.

JURISDICTION

This appeal arises from the conviction of Appellant for the crime of murder in the County Court of Steuben County on July 6, 1971. This conviction was affirmed without opinion in the Supreme Court, Appellate Division, Fourth Department on May 18, 1973. *People v. Patterson*, 41 App. Div. 2d 1028, 344 N.Y.S.2d 836 (4th Dept. 1973).

The Court of Appeals, by a vote of 4-3, affirmed Appellant's conviction and upheld the validity of New York Penal Law, §§25.00; 70.00; 125.20 and 125.25 (1)(a) against Appellant's contention that these statutes, upon which his conviction and sentence were based and which shifted to him the burden of proving facts which would reduce murder to manslaughter, are repugnant to the Due Process clause of the Fourteenth Amendment to the United States Constitution as construed by this Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *In re Winship*, 397 U.S. 358 (1970).

The decision of the New York Court of Appeals was filed and entered on April 1, 1976. Upon this judgment and order of the Court of Appeals and pursuant to New York Civil Practice Law and Rules, Rule 5524, the judgment of the County Court affirming the conviction was entered in the Steuben County Clerk's Office on May 17, 1976. Copies of these judgments and orders appear as Appendix B.

A timely Notice of Appeal to this Court from the judgment and order of the New York Court of Appeals was filed on May 26, 1976 in the Steuben County Court, the Court possessed of

the record. A copy of this Notice of Appeal appears as Appendix C.

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, § 1257(2).

STATUTES INVOLVED

United States Constitution, Amendment XIV.

> "... nor shall any State deprive any person of life, liberty, or property, without due process of law...."

New York Penal Law, §§25.00; 70.00; 125.00; 125.20 and 125.25 are fully set forth in Appendix D herein. Pertinent excerpts follow:

§ 125.25 *Murder in the second degree*

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

> (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; ....

* * * *

§ 125.20 *Manslaughter in the first degree*

A person is guilty of manslaughter in the first degree when:

* * *

2. With intent to cause the death of another person, he causes the death of such person or of a third person

under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; . . .

§ 25.00 *Defenses; burden of proof*

* * *

2. When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence."

QUESTION PRESENTED

Whether the statutory provisions of the New York Penal Law, which placed the burden on Appellant at his trial for murder to prove that he was "acting under the influence of extreme emotional disturbance" in order to reduce murder to manslaughter, on their face and as applied to Appellant, violate the Appellant's right to due process of law under the Fourteenth Amendment to the United States Constitution as construed by this Court in *MULLANEY v. WILBUR*, 421 U.S. 684 (1974) and *IN RE WINSHIP*, 397 U.S. 358 (1970).

STATEMENT OF THE CASE

This appeal arises from Appellant's conviction for murder. The uncontroverted facts are as follows:

Appellant Gordon Patterson and his wife Roberta had a highly unstable marital relationship, marked by recurring verbal arguments and physical assaults (R. 561-64). As a result of one

*R refers to pages in the original Record on Appeal before the Court of Appeals.

such incident, Roberta Patterson left her husband and instituted divorce proceedings (R. 574-82). She also resumed dating John Northrup, a neighbor to whom she had been engaged prior to her marriage to the defendant (R. 442, 584). On December 27, 1970, the defendant, carrying a borrowed rifle, went to his father-in-law's residence and observed his wife in a state of semi-undress in John Northrup's presence. Thereupon, he entered the house and shot Northrup twice in the head, killing him (R. 480, 510). At the trial, Appellant raised the affirmative defense that at the time of the alleged crime he was "acting under the influence of extreme emotional disturbance". Pursuant to the New York statutory scheme Appellant had the burden of proving this affirmative defense by a preponderance of the evidence in order to reduce murder to manslaughter. Penal Law, §§25.00; 125.20; 125.25 (1)(a).

Appellant called Dr. William Libertson, a practicing psychiatrist (R. 984) whom the District Attorney described as having impressive qualifications (R. 1128). Dr. Libertson testified that in his opinion Appellant, at the time of entering the scene of the alleged crime, was acting under the influence of extreme emotional disturbance. Dr. Libertson explained that the impact of Appellant's wife's rejection led to a rising state of emotionality and poor control (R. 998). He testified that with a reasonable degree of medical certainty (R. 1016), that Appellant at the time of the shooting, was under such a state of extreme emotional disturbance that his perceptions were warped, his acts were irrational, and his ability to control himself was defective (R. 1018).

Another psychiatrist, Dr. Martin Lubin of New York City, who was retained by the prosecution, examined Appellant prior to trial. The District Attorney did not call Dr. Lubin to testify

and conceded that Dr. Lubin's testimony would have supported the testimony of the Appellant's witness, Dr. Libertson (R. 1075, 1129).

Based on the homicide provisions of the New York Penal Law, the trial judge charged the jury:

> "I have already instructed you that, generally, the burden rests on the prosecution to prove beyond a reasonable doubt that the defendant is guilty of the crime charged. In this respect, the defendant's raising of an affirmative defense makes a slight variation; although the rule still stands, generally, as to proof of the whole case, the burden of proving his affirmative defense — that indeed his acts were under extreme emotional disturbance which appears, reasonably, to be an explanation or excuse — is placed upon the defendant himself. The District Attorney is not required to deny this excuse. The defendant must by his proof convince you both that he was so emotionally influenced, and that it is a reasonable explanation and excuse for what he did. But he need not prove it beyond a reasonable doubt, but merely by a preponderance of the evidence . . . .". (R. 1202, 1203).

* * * * * *

"I would again refer to the crime of manslaughter in the first degree, and say that if you find that the defendant killed John Northrup with intent to cause his death or with intent to cause the death of another person or persons, and if you find — not beyond a reasonable doubt but by a preponderance of the evidence — that he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, your verdict must be one of manslaughter in the first degree." (R. 1212)

* * * * * *

"The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree. . . ." (R. 1206)

* * * *

> "This does not mean that the emotional disturbance exonerates the killer, or renders his killing guiltless. As long as he actually intended to cause the death of another person * * * the killing remains a crime, and remains a homicide but is punishable in a less severe manner than murder." (R. 1210).

The jury returned a verdict of guilt and a judgment of conviction for murder was entered in the Steuben County Court on July 6, 1971. Appellant was sentenced to a term of 20 years to life imprisonment. The Supreme Court of the State of New York, Appellate Division, Fourth Department, unanimously affirmed the conviction without opinion, by judgment and order dated, May 18, 1973. *People v. Patterson*, 41 App. Div. 2d 1028, 344 N.Y.S.2d 836 (4th Dep't. 1973). Permission to Appeal was granted by a Judge of the New York Court of Appeals and a Notice of Appeal to the New York Court of Appeals was filed on November 30, 1973.

On April 1, 1976, the Court of Appeals, by a 4-3 vote, affirmed Appellant's conviction for murder and upheld the constitutionality of the New York Penal Law provisions which required Appellant to prove that he was "acting under the influence of extreme emotional disturbance" in order to reduce murder to manslaughter. The majority opinion held that "the law of this State does not infringe the due process interests that *Mullaney* sought to protect" (A-9)* The New York Court of Appeals concluded that *Mullaney* is not applicable because, unlike Maine, the New York affirmative defense in question "does not negate intent" which "the prosecution is at all times required to prove . . . ." (A-16). The New York Court concluded further that *Mullaney* was distinguishable on the grounds that "the opportunity opened for mitigation differs significantly from the traditional heat of passion defense." (A-16). Yet, noting that the three dissenters formed a contrary interpretation of

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*A refers to pages in Appendix A attached hereto.

Mullaney, the Court stated: "To be sure, the issue is not free from doubt". (A. 17).

Even greater doubt was expressed by one of the 4-3 majority, Judge Jones, who in a separate concurring opinion stated:

> "Thus, I am not prepared ... to strike down the provision here under review because on one analysis the opinion of the United States Supreme Court in *Mullaney v. Wilbur*, 421 U.S. 684, would appear to call for that result. Another reading of the same opinion leads *others* to a different conclusion. In that circumstance, I conclude that, until there has been an explicit determination by the Supreme Court which permits us no alternative, it serves better in this case to leave to that Court the articulation of its views ..." (A. 22) (Emphasis added.)

The separate concurring opinion of Chief Judge Charles Breitel, favorably referred to in the majority opinion (A. 18) reveals a basic disagreement with this court's decision in *Mullaney* (A. 19-A. 21). He states:

> "The placing of the burden of proof on the defense, with a lower threshold, however, is fair because of defendant's knowledge or access to the evidence other than his own on the issue. To require the prosecution to negative the 'element" of mitigating circumstances is generally unfair." (A. 20)

The three dissenters would have voted to reverse Appellant's conviction on the basis that *Mullaney* was "determinative" of his due process claim (A. 26).

Significantly, the majority opinion specifically found that "the People did not controvert the testimony of the defense psychiatrist ..." (A. 18). This finding highlights the crucial nature of the burden of proof issue in this case.

How the federal question was presented. While this appeal was pending in the New York Court of Appeals, this Court decided *Mullaney v. Wilbur, supra*, on June 9, 1975. After the

Mullaney decision was rendered the *Mullaney* question was presented to the Court of Appeals in "Appellant's Supplemental Brief". In this brief, Appellant challenged the homicide statutes under which he was convicted on the basis that it was a violation of his Fourteenth Amendment due process rights to require him to bear the burden of proving facts which would reduce the crime from murder to manslaughter. Appellant claimed that *Mullaney v. Wilbur, supra*, and *In re Winship*, 397 U.S. 358 (1970) were controlling.*

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

A. The majority opinion below, upholding the validity of the New York Penal Law requirement that the defendant in a murder prosecution must bear the burden of proving the affirmative defense that he was "acting under the influence of extreme emotional disturbance" in order to reduce murder to manslaughter, is in direct conflict with this Court's decisions in *Mullaney v. Wilbur* and *In re Winship*.

1. *The New York Affirmative Defense Provisions are Functionally Identical to the Maine Rule Declared Unconstitutional by This Court in* Mullaney v. Wilbur.

The New York Court of Appeals decision below is in direct conflict with *Mullaney v. Wilbur*, 421 U.S. 684 (1975) because the New York statutory scheme challenged by Appellant is

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*The Court of Appeals was unanimous in its conclusion that Appellant properly and timely raised his challenge to the constitutionality of the New York Penal Law. See Stern and Gressman, Supreme Court Practice, (4th Ed. 1969), Section 3.28, pp. 127-128. In so far as the timing of when the federal question was raised, this case is in the precise procedural posture as *Mullaney v. Wilbur*, 421 U.S. 684, at p. 688, f.n. 7; and p. 704, footnote (concurring opinion).

functionally identical to the Maine rule declared unconstitutional in *Mullaney*.

In *Mullaney* this Court unanimously held that it was a violation of the Due Process clause of the Fourteenth Amendment to the United States Constitution for a state to require a defendant in a murder trial to bear the burden of proof of a fact which would reduce murder to manslaughter.

In reaching this conclusion this Court rejected Maine's contention that this Court's decision *In re Winship* was inapplicable because the challenged rule in Maine involved only "reductive factors".* The gravamen of *Mullaney* is that where proof of a fact (e.g. "heat of passion") leads to conviction of an offense of lesser criminal culpability (e.g. manslaughter as opposed to murder), even though not leading to total exoneration, the due process principles of *In re Winship* require that the prosecution bear the burden of proving that "critical fact in dispute" (*Mullaney* at p. 701).

The New York affirmative defense in question has the same function as the "heat of passion" affirmative defense of Maine in that if defendant proves the defense the crime is reduced from murder to manslaughter. As in Maine, the New York affirmative defense is a mitigating element reducing murder to manslaughter rather than complete exoneration of the crime charged. As in Maine, the due process interests to be protected by proof of "the critical fact in dispute" ("heat of passion" in Maine or "extreme emotional disturbance" in New York) are the stigma attached to murder as opposed to manslaughter and significant punishment differentials.** As in Maine, the New

*These "reductive factors" referred to mitigation from murder to manslaughter upon proof by a defendant that he was acting in the "heat of passion" at the time of the alleged crime.

**The Court of Appeals did not question that the punishment differentials between murder and manslaughter in New York are "significant." (A. 15). See New York Penal Law Section 70.00 in Appendix D.

York affirmative defense in question distinguishes the crime of murder from the crime of manslaughter. In terms of *Winship*, both the Maine and New York affirmative defenses require the defendant to prove the "facts necessary to constitute the crime". *In re Winship, supra*, at 364.

Despite clear doubt about its own conclusion, the majority of the New York Court of Appeals upheld the validity of the challenged New York statutes, concluding that" . . . the New York law of homicide differs significantly from the Maine law struck down in *Mullaney*", and therefore the New York law ". . . does not infringe the due process interests that *Mullaney* sought to protect". (A. 9). The majority viewed the Maine law as requiring the defendant to negate malice aforethought with proof that he acted under the heat of passion in order to reduce murder to manslaughter. The majority interpreted *Mullaney* as striking down the Maine rule because ". . . the state could not constitutionally provide the prosecution with a presumption of malice and then require the defendant to negate it with proof that he acted under the heat of passion" (A. 15 — A. 16). Thus, the majority reasoned that *Mullaney* does not apply because, unlike Maine, "(I)n New York, the prosecution is at all times required to prove, beyond a reasonable doubt, the facts bearing the defendant's intent" (A. 16).

This view of the majority of the New York Court of Appeals directly conflicts with the clear holding of *Mullaney*. In *Mullaney*, this Court stressed that the due process requirements of *Winship* are not satisfied where the burden of proof is placed on the defendant to prove the fact that distinguishes murder from manslaughter even though the prosecution carries the overall burden to prove intent beyond a reasonable doubt.

Further, Appellant submits that as to proof of intent there is no difference between the Maine and New York law of homicide. In Maine, as in New York, the prosecution bears the

burden to prove intent beyond a reasonable doubt. As the Court stated in *Mullaney:*

> "The Maine law of homicide, . . . , can be stated succinctly: Absent justification or excuse, all *intentional* or criminally reckless killings are felonious homicides. Felonious homicide is punished as murder . . . unless the defendant proves by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation, in which case it is punished as manslaughter . . ." 421 U.S. 684, at pp. 691-2. (Emphasis added) (Footnotes omitted).
>
> * * *
>
> "The trial court instructed the jury that Maine law recognizes two kinds of homicide, murder and manslaughter, and that these offenses are not subdivided into different degrees. The common elements of both are that the homicide be unlawful — i.e. neither justifiable nor excusable — and that it be intentional. The prosecution is required to prove these elements by proof beyond a reasonable doubt, and only if they are so proved is the jury to consider the distinction between murder and manslaughter." 421 U.S. 684, at pp. 685-6.

Therefore the New York Court's reliance on this distinction between Maine and New York law is erroneous.

The majority of the Court of Appeals also distinguished *Mullaney* on the basis that "(T)he opportunity opened for mitigation differs significantly from the traditional heat of passion defense" (A. 16). The majority stated, concerning the difference between the traditional and modern version of the affirmative defense;*

> "An action influenced by an extreme emotional disturbance is not one that is *necessarily* so spontaneously unintentional. Rather it *may* be that a significant mental trauma has affected a defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably *coming to the fore.*" (A. 16 — A. 17)* (Emphasis added).

*The majority opinion recognized that language of the New York affirmative defense is clearly derived from the "heat of passion" defense of common law (A. 14). See, *Fuentes v. State,* 349 A.2d 1, 5 (1975) where the Delaware Supreme Court held *Mullaney* to be applicable to the Delaware affirmative defense of "extreme emotional distress".

The New York and Maine affirmative defenses both distinguish murder from manslaughter and require the defendant to prove the distinguishing element. *Mullaney* does not rest on the language or precise scope of these affirmative defenses, but rather on the fact that the burden is shifted to the defendant to prove the fact which reduces murder to manslaughter. The New York affirmative defense to murder functions identically to the Maine affirmative defense struck down in *Mullaney* because it is "the single most important factor in determining the degree of culpability attaching to an unlawful homicide." (421 U.S. 684 at 696).

For these reasons, Appellant argues that *Mullaney* is determinative of Appellant's claim and the decision of the Court of Appeals is thus in conflict with *Mullaney.*

2. *The Decision in* People v. Patterson *if Left Standing, Will Circumvent This Court's Decision in* Mullaney.

The majority opinion of the Court of Appeals upholds the constitutionality of a statutory scheme which shifts to the defendant the burden of proving a fact which is the distinguishing element between murder and manslaughter and which results in a "significant" punishment differential. Thus, the decision in *People v. Patterson,* if left standing, provides the statutory model to circumvent *Mullaney* and *Winship.* Any state legislature could enact the New York statutory scheme; the constitutionality of such legislation could be upheld by reliance on the New York interpretation of *Mullaney* in *Patterson.*

*The defense of insanity is clearly not involved being a distinct concept in New York and requiring the prosecution to bear the burden of proof. New York Penal Law §§25.00, 30.05.

Mullaney made clear that the principles of *Winship* should not be undermined by legislative redefinition of "the elements that constitute different crimes . . ." 421 U.S. 684 at 698). Specifically, *Mullaney* held that the due process principles of *Winship* cannot be circumvented by a state providing for "reductive factors" to be proved by the defendant which reduces murder to manslaughter.

This Court should hear this appeal to insure the states' compliance with the decision in *Mullaney*.

B. The New York decision in *Patterson* is in conflict with other states.

The decision in *Patterson* is in conflict with other states deciding the *Mullaney* issue.

The Supreme Court of Delaware has invalidated the Delaware requirement that the defendant must prove the affirmative defense of "extreme emotional distress" in light of *Mullaney*. *Fuentes v. State*, 349 A.2d 1 (1975). It is noteworthy that the Delaware Supreme Court viewed the "extreme emotional distress" defense as a "substitute" for the common law defense of provocation and viewed the New York affirmative defense as "analogous". *Fuentes v. State*, *supra*, at p. 5.

The North Carolina Supreme Court in holding invalid the North Carolina rule requiring the defendant to prove self-defense (*State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975)), made it clear that the North Carolina rule requiring the defendant to prove the "heat of passion" defense is also invalid in light of *Mullaney*.

The Maryland Court of Special Appeals has voided, *inter alia*, the Maryland rule that the defendant must prove "heat of passion" on the basis of *Mullaney*. *Evans v. State*, 28 Md. App. 640, 349 A.2d 300 (1975). A petition for writ of certiorari to

review the *Evans* decision was granted by the Maryland Court of Appeals on February 13, 1976. The appeal is pending.

In light of the conflict between New York and other state courts, this Court should hear this appeal to insure uniformity in the application of the constitutional mandates of *Winship* and *Mullaney*.

CONCLUSION

For the reasons stated, this Court should note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: Ithaca, New York
June , 1976

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE NEW YORK COURT OF APPEALS

STATE OF NEW YORK
COURT OF APPEALS

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4 No. 70

The People &c.,

Respondent,

vs.

Gordon G. Patterson, Jr.,

Appellant.

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(70)

Betty D. Friedlander and Victor J. Rubino for appellant.

John M. Finnerty, District Attorney, for respondent.

JASEN, J.:

The principal issue on this appeal is whether, in a murder prosecution, constitutional due process limitations are invaded by placing the burden of persuasion on a defendant with respect to the defense of acting "under the influence of extreme emotional disturbance" in order to reduce the homicide to the less culpable crime of manslaughter in the first degree.

The defendant, Gordon Patterson, and his wife, Roberta, had a highly unstable marital relationship, marked by recurring verbal arguments and physical assaults. As a result of one such incident, Roberta Patterson left her husband and instituted divorce proceedings. She also resumed dating John Northrup, a neighbor to whom she had been engaged prior to her marriage to

the defendant. On December 27, 1970, the defendant, carrying a borrowed rifle, went to his father-in-law's residence and observed his wife in a state of semi-undress in John Northrup's presence. Thereupon, he entered the house and shot Northrup twice in the head, killing him. The defendant confessed to the killing and, after a hearing, the confession was held voluntary and was admitted into evidence against him at trial. Defendant's wife, an eyewitness to the crime, testified, over objection of defense counsel, that defendant fired two shots at the victim from close range. The defense called eleven witnesses, including the defendant, who testified in great detail as to the defendant's life and particularly that period of his life when he was married to Roberta Patterson. The defense at the trial was that the crime, if there was one, was unintentional. This was based on defendant's version of events to the effect that the gun went off accidentally. Defendant also raised the affirmative defense that at the time of the alleged crime, he was acting under the influence of extreme emotional disturbance.

The court's charge to the jury was based on the homicide provisions of the Penal Law (§§ 125.25 [subd (1)(a)][1] , 125.20

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[1]Penal Law, section 125.25 (subd [1][a]):

"*§ 125.25 Murder in the second degree*

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; or * * * *"

[subd (2)][2]). The jury was instructed that "[t]he mere fact that the defendant fired a gun and thereby killed John Northrup does not, alone, suffice to establish his guilt of murder. The offense, as here charged, is an intent crime, and the law requires that it be proved beyond a reasonable doubt that the defendant acted intentionally." The People were required to establish beyond a reasonable doubt that the defendant "intended, in firing the gun, to kill either the victim himself or some other human being." To find intent, the jury had to conclude that the defendant had the "conscious objective to cause death, and that his act or acts resulted from that conscious objective." The jury was cautioned that they "must not expect or require the defendant to prove to your satisfaction that his acts were done without the intent to kill. Whatever proof he may have attempted, however far he may have gone in an effort to convince you of his innocence or guiltlessness, he is not obliged, he is not obligated to prove anything. It is always the People's burden to prove his guilt, and to prove that he intended to kill in this instance beyond a reasonable doubt."

With respect to the defense of extreme emotional disturbance, the court stated that the point of this evidence was to convince

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[2]Penal Law, section 125.20 (subd [2]):

"*§ 125.20 Manslaughter in the first degree*

A person is guilty of manslaughter in the first degree when:

* * * *

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; * * * *"

the jury, by a preponderance of the evidence, that "the defendant's apparent intention to cause death, if you should find there was such, was not the result of a calm and calculating decision on his part, but that it was influenced by extreme emotional disturbance." The court did not elaborate on the definition of "extreme emotional disturbance", noting that the words are "self-evident in meaning". However, the court cautioned that " 'extreme' precludes mere annoyance or unhappiness or anger, but requires disturbance excessive and violent in its effect upon the defendant experiencing it." As to the burden of proof, the court repeated its earlier instruction that "generally, the burden rests on the prosecution to prove beyond a reasonable doubt that the defendant is guilty of the crime charged. In this respect, the defendant's raising of an affirmative defense makes a slight variation; although the rule still stands, generally as to proof of the whole case, the burden of proving his affirmative defense — that indeed his acts were under extreme emotional disturbance which appears, reasonably, to be an explanation or excuse — is placed upon the defendant himself. The District Attorney is not required to deny this excuse."

Finally, the court instructed the jury that "[t]he fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree * * * *". The court went on to explain that "[t]his does not mean that the emotional disturbance exonerates the killer, or renders his killing guiltless. As long as he actually intended to cause the death of another person * * * the killing remains a crime, and remains a homicide, but is punishable in less severe manner than

murder." No objection was taken to the above quoted portions of the court's charge.[3]

The jury found the defendant guilty of murder. The Appellate Division unanimously affirmed the judgment of conviction.

During the pendency of this appeal, the United States Supreme Court decided the case of *Mullaney* v. *Wilbur* (421 US 684), wherein the court, passing on a Maine statute, held that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." (421 US at p 704.) Defendant argues that *Mullaney* is controlling in this case and requires the striking down of Penal Law sections 125.20 and 125.25 to the extent that they require a defendant charged with murder to bear the burden of proving the affirmative defense that he acted under the influence of extreme emotional disturbance.

At the threshold we are confronted with two procedural issues. The first is whether the defendant has preserved a question of law for our review, and, secondly, even if he has, whether *Mullaney* should be applied retroactively to a trial already completed. The defendant's constitutional contentions are based entirely upon a reading of the *Mullaney* decision. The jury was charged by the court on June 7, 1971, four years and two days in advance of *Mullaney*. At that time none of the various affirmative defenses contained in the 1967 revision of the Penal Code had yet been attacked on due process grounds. (See *People* v. *Laietta*, 30 NY2d 68, cert den 407 US 923

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[3]The only objection taken to the charge was that the jury could "infer" from the court's instructions that its only choice was between murder and manslaughter, whereas the jury could acquit the defendant. We note that the court's instructions are not susceptible to any such "inference" and that this point is not advanced by the defendant on appeal.

[affirmative defense of entrapment].) In May 1973, when the Appellate Division affirmed the judgment of conviction, there was no intimation that the homicide provisions might be vulnerable to serious constitutional challenge. In fact, the initial brief filed by appellant in our court did not raise a due process argument. The point was raised for the first time in a supplemental brief prepared after *Mullaney* was handed down.

Our court, with a narrow exception applicable in capital cases, is strictly a law court. A failure to object to a charge at a time when the trial court had an opportunity to effectively correct its instructions does not preserve any question of law that this court can review. (CPLR § 470.05, subd 2; *People* v. *Robinson*, 36 NY2d 224, 228.) Strict adherence to the requirement that complaint be made in time to permit a correction serves a legitimate state purpose. (*Henry* v. *Mississippi*, 379 US 443, 447.) A defendant cannot be permitted to sit idly by while error is committed, thereby allow the error to pass into the record uncured, and yet claim the error on appeal. Were the rule otherwise, the state's fundamental interest in enforcing its criminal law could be frustrated by delay and waste of time and resources invited by a defendant. While the review by this court is restricted, on the initial appeal to the Appellate Division, that court, with its broader powers of review, may consider claims of error, notwithstanding a failure to object. (CPL § 470.15; *People* v. *Robinson*, *supra*.)

There is one very narrow exception to the requirement of a timely objection. A defendant in a criminal case cannot waive, or even consent to, error that would affect the organization of the court or the mode of proceedings proscribed by law. (*Cancemi* v. *People*, 18 NY 128, 138; *People ex rel. Battista* v. *Christian*, 249 NY 314, 319.) In *Cancemi*, it was held that a defendant could not consent to being tried by a jury of less than twelve members. In *People ex rel. Battista* v. *Christian* (*supra*), the

court ruled that an information charging a defendant with an "infamous" crime was a nullity, despite defendant's consent, where the State Constitution provided that infamous crimes could be prosecuted only by grant jury indictment. Thus, the rule has come down to us that where the court had no jurisdiction, or where the right to trial by jury was disregarded, or where there was a fundamental, nonwaivable defect in the mode of procedure, then an appellate court must reverse, even though the question was not formally raised below. (*People* v. *Bradner*, 107 NY 1, 4-5; see *People* v. *Miles*, 289 NY 360, 363-364.)

This traditionally limited exception has, on occasion, been given broader expression. In *People* v. *McLucas* (15 NY2d 167), the defendant did not object to a comment by the trial court on his failure to testify. Our court ruled that "no exception is necessary to preserve for appellate review a deprivation of a fundamental constitutional right." (At p 172.) Since the defendant's right against self-incrimination had been violated, the judgment of conviction was reversed.

As we view it today, the purpose of this narrow, historical exception is to ensure that criminal trials are conducted in accordance with the mode of procedure mandated by constitution and statute. Where the procedure adopted by the court below is at a basic variance with the mandate of law, the entire trial is irreparably tainted. As we stated nearly fifty years ago, "prosecutions must be conducted in substance and without essential change as the Constitution commands." (*People ex rel. Battista* v. *Christian*, 249 NY 314, 319, *supra*.) Defendant Patterson contends that the burden of proof on the issue of extreme emotional disturbance was improperly placed upon him. If the defendant's argument is meritorious, his trial was not conducted in accordance with the procedure mandated by state law. Our law provides that "[n]o conviction of an offense by

verdict is valid unless based upon trial evidence which is legally sufficient and which establishes beyond a reasonable doubt every element of such offense and the defendant's commission thereof." (CPL § 70.20.) If the burden of proof was improperly placed upon the defendant, defendant was deprived of a properly conducted trial, the distribution of the burden of persuasion being just as significant as the proper composition of the jury. Since the error complained of goes to the essential validity of the proceedings conducted below, we believe there is a question of law that our court should review.

We also note that prior to *Mullaney*, there was no doubt in this state that the extreme emotional disturbance affirmative defense was constitutionally valid. The defendant's failure to object to a practice deemed valid in this state cannot deprive him of the right to attack that practice when an intervening Supreme Court decision calls that practice into question. (See *O'Connor* v. *Ohio*, 385 US 92, 93; *People* v. *Baker*, 23 NY2d 307, 317.) It is also significant that *Mullaney* was not handed down until well after the Appellate Division affirmed Patterson's conviction. Were we not to treat appellant's claim on the merits, Patterson would be deprived of a state forum in which his arguments could be heard. (Cf., *People* v. *Robinson*, 36 NY2d 224, 228, *supra*.)

As to the second procedural issue, we hold that the defendant may assert a *Mullaney* claim even though his conviction predates that decision. We note that *Mullaney* was based on the Supreme Court's earlier holding in *In re Winship* (397 US 358), a decision subsequently given retroactive effect. (*Ivan* v. *City of New York*, 407 US 203.) *Mullaney*, like its progenitor *Winship*, should be given retroactive effect.

We, therefore, turn to the merits of the defendant's *Mullaney* claim. In our view, the New York law of homicide differs

significantly from the Maine law struck down in *Mullaney*. We believe that the law of this State does not infringe the due process interests that *Mullaney* sought to protect.

To put the constitutional issues in focus, and to point up the differences between the law of New York and the common law approach still followed in Maine, it is necessary to review the history and development of the law of homicide in this state. As a colony, and then in early statehood, New York drew upon the English common law for its formulations of the homicide offenses. The crimes of murder and manslaughter, the only grades of culpable homicide known to the common law, were defined, and punished, in the same fashion as the English courts had for centuries. (1937 Report of N.Y. Law Rev. Comm., pp 540, 702-410.) In 1829, the Legislature codified, for the first time, the New York law of homicide. Murder was defined as a single, degreeless crime committed "[w]hen perpetrated from a premeditated design to effect the death of the person killed * * * *"[4] (Revised Statutes of New York, 1829, Part IV, Ch 1, Tit 1, § 5.) On the other hand, manslaughter was divided into four degrees. A killing committed "without a design to cause death, in the heat of passion" was a manslaughter. If the killing was accomplished in "a cruel and unusual manner", the crime was a second degree offense; if the killing was accomplished by the use of "a dangerous weapon", it was a third degree offense. An involuntary killing, "by a weapon, or by means neither cruel or unusual" in the heat of passion was manslaughter in the fourth degree. (Revised Statutes, 1829, Part IV, Ch 1, Tit 2, §§ 10, 12, 18.) As a result of this statutory change,

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[4]This statute, as well as the other statutes to be discussed *infra*, contained other provisions, including the forerunners of our present felony murder and "depraved indifference" murder statutes. (See Penal Law, § 125.25 [subds (2), (3)].) However, for present purposes, it is sufficient to confine our discussion to the development of the crimes of intentional murder and voluntary manslaughter.

a "clear-cut and decisive cleavage" was made between the crimes of murder and manslaughter, based upon the presence or absence of a "design to effect death". (1937 Report of the N.Y. Law Rev. Comm., p 544, *supra.*) Moreover, where the common law had implied malice from the very fact of the homicide where a dangerous weapon had been used or the killing had been accomplished in a cruel and inhuman fashion, the New York revision deemed such acts to be manslaughter unless it could be proved that the defendant had a design to effect death. (*Id.*, at p 545.)

In 1860, following the early lead of Pennsylvania and Virginia (see Wechsler, Codification of Criminal Law in the United States: The Model Penal Code, 68 Colum. L.R. 1425, 1445), the Legislature split the crime of murder into two categories, in an attempt to alleviate some of the harsh effects of capital punishment. Murder "perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing * * *" was murder in the first degree and punishable by death. (L. 1860, ch 410, §§ 1, 2.) Any other murder was in the second degree and punishable by life imprisonment at hard labor. (L. 1860, ch 410, §§ 2, 6.)[5] In 1862, first degree murder was redefined to include killings

[5]This act inadvertently repealed, by the omission of a savings clause, the prior law defining crimes and authorizing the imposition of sentences. (L. 1860, ch 410, § 7.) in *People* v *Hartung* (22 NY 95), the court held that the 1860 statute could not, by virtue of its ex post facto effect, be given retroactive application. Since it appeared that persons accused or convicted prior to the passage of the 1860 Act might have to be released, the Legislature attempted to give the 1860 statute retroactive effect by granting defendants convicted prior to the passage of the 1860 Act or convicted of crimes committed prior to passage, the option of selecting either life imprisonment or the death penalty. (L. 1861, ch 303, § 3.) In 1862, the Legislature reverted back to the law as it stood prior to 1860. (L. 1862, ch 197, §§ 4, 5.) However, a narrowed second degree murder offense was retained. (L. 1862, ch 197, § 5.)

"perpetrated from a premeditated design to effect the death of the person killed." (L. 1862, ch 197, § 5.)

The two-tier murder offense was carried over into the Penal Code of 1881. The first degree offense was committed when the killing was perpetrated out of "a deliberate and premeditated design to effect the death of the person killed". (3 Laws of New York, 1881, § 183[1].) The second degree offense was newly defined as a killing "committed with a design to effect the death of the person killed * * * but without deliberation and premeditation." (3 Laws of New York, 1881, § 184.) The punishments remained death and life imprisonment, respectively. (3 Laws of New York, 1881, §§ 186, 187.) The four degrees of manslaughter were reduced to two. A killing, "[i]n the heat of passion, but accomplished in a cruel and unusual manner or by means of a dangerous weapon" became manslaughter in the first degree, punishable by an imprisonment of between five and twenty years. (3 Laws of New York, 1881, §§ 189 [subd (2)], 192.) A heat of passion killing not committed by use of a deadly weapon or by a cruel and unusual means was a second degree offense, punishable by imprisonment of one to 15 years and/or a fine not in excess of $1,000. (3 Laws of New York, 1881, §§ 193 [subd (2)], 202.) The Penal Law of 1909, the immediate precursor of our present statute, retained the same definitions, with some alteration in the punishments to be meted out. (Former Penal Law, §§ 1044[1], 1045, 1046, 1048, 1050[2], 1051, 1052[2], 1053.)

From this historical review, two points are made abundantly clear. First, New York, since its first statutory enactment in 1829, has always defined murder and manslaughter as separate and distinct offenses with punishments varying to fit the degree of the crime. Maine, on the other hand, has remained truer to the common law by defining but one generic category of felonious homicide, holding out a possibility of mitigation only

in the form of punishment. Secondly, ever since 1829, New York has refused to imply malice from the act of killing, requiring the prosecution to establish, where it seeks to prove a murder, that the defendant possessed a design to effect death. Thus, in *Stokes* v. *People* (53 NY 164), the court held that "[m]ere proof of the killing did not, as a legal implication, show" that the defendant committed the killing from a premeditated design to effect a human death. (At pp 179, 180.) This, again, is in contradistinction to the law of Maine struck down in *Mullaney*. (421 US at p 686, n 4; *State* v. *Lafferty*, 309 A2d 647, 965.) In *Stokes*, the court, in noting that the common law of England implied malice from the proof of killing only, cited the American case most often referred to for that principle, *Commonwealth* v. *York* (50 Mass [9 Metcalf] 93) (53 NY at p 179). The law of Maine is still based on a *York* approach (see 421 US at pp 695, 696), an approach rejected in *Stokes* as in contradiction to the New York statutes (53 NY at p 179).

In 1961, a study commission was appointed to thoroughly review and update penal statutes that had not been subjected to a full scale examination since the 1881 Penal Code. The Revised Penal Law of 1967, the end product of the Commission's work, contained new homicide provisions reflective of contemporary thought, to replace an anachronistic statute replete with concepts whose validity had been substantially eroded by time. Thus, the factors of premeditation and deliberation were discarded entirely. These two concepts, which alone distinguished first degree murder from second degree murder (and therefore death from life imprisonment), had become completely nebulous. (Third Interim Report of the Temporary Commission on Revision of the Penal Law and Criminal Code, N.Y. Legis. Doc. 1964, No. 14, p 22.) In the words of Mr. Justice Cardozo, "[i]f intent is deliberate and premeditated whenever there is choice, then in truth it is always deliberate and

premeditated, since choice is involved in the hypothesis of the intent. What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistably for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words." (Cardozo, Law and Literature, pp 100-101; see also, Wechsler, Codification of Criminal Law in the United States: The Model Penal Code, 68 Colum. L.R. 1425, 1445-1446.) The revised 1967 statute made murder a single, degreeless crime, requiring that the defendant, "[w]ith intent to cause the death of another person, * * * causes the death of such person or of a third person." (Penal Law, § 125.25.)[6]

The manslaughter provisions in the former Penal Law were also substantially revised. Under the old provisions, manslaughter was a fatal assault committed without homicidal intent, without a design to effect death. (Former Penal Law, §§ 1050, 1052.) "Heat of passion" had become, not a mitigating factor that would reduce a murder to manslaughter, but an affirmative element of a specified type of manslaughter. In its

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[6]In 1974, the Legislature added a new crime, murder in the first degree. (Penal Law, § 125.27.) This statute comes into operation where the victim of the murder is a police officer, an officer in a correctional facility or where the defendant was incarcerated for a life sentence. A convicted defendant is to be sentenced to death. (Penal Law, § 60.06.) As part of this enactment, section 125.25, which formerly defined the degreeless crime of murder, was retitled, without a change in substance, murder in the second degree. (L. 1974, ch 367, § 4.)

It is noteworthy that the new first degree murder offense also provides that the defendant may assert the affirmative defense of extreme emotional disturbance. (Penal Law, § 125.27[2][a].) Successful interposition of the defense would reduce the crime to manslaughter in the first degree, not to murder in the second degree.

proposed statute, the Commission suggested the elimination of the "hybrid offense" that had developed in New York, coupled with a return to the traditional principles of mitigation. (Notes of the Staff of the State Commission on Revision of the Penal Law and Criminal Code, 1967 Gilbert, Criminal Law and Practice of New York, pp 1C-1, 1C-61—1C-62.) The Commission also replaced the traditional language of "heat of passion", with a new formulation, "extreme emotional disturbance". In this respect, the Commission adopted the manslaughter provisions in the Model Penal Code. (Model Penal Code, § 201.3 [subd (1) par (b)].) This change was designed to avoid limiting mitigation to the situation where a defendant, provoked, acts "under the influence of some sudden and uncontrollable emotion excited by the final culmination of * * * misfortunes * * * * *" (*People* v. *Caruso*, 246 NY 437, 446.) The new formulation does not impose so arbitrary a limit on the nature of circumstances that might justify a mitigation. (Model Penal Code, § 201.3, Comment, pp 46-47 [Tent. Draft No. 9].)

The original 1964 proposal of the Commission did not, as the Model Penal Code does not, expressly state that the burden of establishing mitigating circumstance is upon the defendant. To clarify the situation, the 1965 proposal, ultimately enacted, made extreme emotional disturbance an affirmative defense to be proved by the defendant. The 1965 bill made no other substantive changes. (Fourth Interim Report of the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code, N.Y. Legis. Doc. 1965, No. 25, pp 29-30.)

The present Penal Law thus provides that it is an affirmative defense to a murder prosecution that the "defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse * * * * *" (Penal Law, § 125.25 [subd (1), par (a)].) The defense must be

established by a preponderance of the evidence. (Penal Law, § 25.00 [subd (2)].) If the defense proves successful, the defendant may not be found guilty of the crime of murder, but only of the crime of manslaughter in the first degree. (Penal Law, § 125.20 [subd 2].) The sentences that might be imposed for these crimes differ significantly. (See Penal Law, § 70.00.)

We conclude that the New York statutes do not infringe the due process interests which *Mullaney* v. *Wilbur* (421 US 684, *supra*) sought to protect. The Due Process clause of the Federal Constitution requires that a conviction cannot be had unless the prosecution proves beyond a reasonable doubt "every fact necessary to constitute the crime" with which a defendant is charged. (*In re Winship*, 397 US 358, 364.) In New York, the prosecution in order to obtain a conviction for murder, must prove beyond a reasonable doubt that the defendant, with intent to cause the death of another person, did cause the death of such person or of a third person. (Penal Law, § 125.25 [subd 1].) With respect to intent, the People must establish that the defendant's conscious objective was to cause the death of the other person. (Penal Law, § 15.05 [subd 1].) Intent may not be inferred from the simple fact of killing, but must be proved by other facts. That New York will permit the defendant to establish the existence of mitigating circumstances, collateral to the principal facts at issue, does not detract in the smallest degree from the rule, long established in this State, that the prosecution must prove intent beyond a reasonable doubt.

The law of Maine, under consideration in *Mullaney*, did not make the "facts of intent" general elements of the crime of felonious homicide. (421 US at p 699.) Rather, the degree of intent was relevant only to punishment. (*Id.*) Even then, the prosecution was permitted to rely upon a presumption of malice, to be drawn from the fact of a killing. If the defendant acted under the heat of passion on sudden provocation, malice afore-

though was negated since, under Maine law, as well as under the common law, malice and heat of passion are mutually inconsistent. (421 US at pp 686-687.) That is to say, if the defendant's mind was possessed by malice, his actions could not have resulted from an inflamed passion aroused by a sudden provocation. Under Maine law, malice and heat of passion are reflective of the defendant's intent, and the state could not constitutionally provide the prosecution with a presumption of malice and then require the defendant to negate it with proof that he acted under the heat of passion. (421 US at p 702.)

In New York, the prosecution is at all times required to prove, beyond a reasonable doubt, the facts bearing the defendant's intent. That the defendant acted because of an extreme emotional disturbance does not negate intent. The influence of an extreme emotional disturbance explains the defendant's intentional action, but does not make the action any less intentional. The purpose of the extreme emotional disturbance defense is to permit the defendant to show that his actions were caused by a mental infirmity not arising to the level of insanity, and that he is less culpable for having committed them. (See Wechsler, Codification of Criminal Law in the United States: The Model Penal Code, 68 Colum. L.R. 1425, 1446, *supra*.) The opportunity opened for mitigation differs significantly from the traditional heat of passion defense. Traditionally, an action taken under the heat of passion meant that the defendant had been provoked to the point that his "hot blood" prevented him from reflecting upon his actions. (See, e.g., *People* v. *Ferraro*, 161 NY 365, 375.) Furthermore, the action had to be immediate, for if there was time for "cooling off", there could be no heat of passion. (See, e.g., *People* v. *Fiorentino*, 197 NY 560, 563.) An action influenced by an extreme emotional disturbance is not one that is necessarily so spontaneously undertaken. Rather, it may be that a significant mental trauma has affected a

defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore. The differences between the present New York statute and its predecessor and its ancient Maine analogue can be explained by the tremendous advances made in psychology since 1881 and a willingness on the part of the courts, legislators, and the public to reduce the level of responsibility imposed on those whose capacity has been diminished by mental trauma. It is consistent with modern criminological thought to reduce the defendant's criminal liability upon proof of mitigating circumstances which render his conduct less blameworthy. So long as the prosecution must prove, beyond a reasonable doubt, that the defendant intended to kill his victim, it is not a violation of due process to permit the defendant to establish he formulated his intent while "under the influence of extreme emotional disturbance."

Our dissenting brethren would draw a contrary conclusion based upon a broad reading of selected portions of the *Mullaney* opinion. We recognize that some of the language in *Mullaney* might, by a process of extrapolation, be applied to the provisions of the New York Penal Law. To be sure, the issue is not free from doubt. Yet it must also be recognized that judicial opinions are not written and rendered in the abstract. Language is given its meaning by the context which compels its writing. It is basic to our common law system that a court decides only the case before it. While the Supreme Court in *Mullaney* struck down the Maine law of homicide, it did not reach out and pass on the constitutional validity of every state criminal statute that contains either an affirmative defense or a policy presumption. We believe, from our review of the history and development of the New York law of homicide, that New York homicide law differs significantly from the homicide law of Maine. In our view, this essential difference makes this case materially distinct

from that presented to the Supreme Court in *Mullaney*. For this reason, we do not believe that *Mullaney* mandates a holding that the affirmative defense of extreme emotional disturbance is unconstitutional (See *Mitchell* v. *W.T. Grant Company*, 416 U.S. 600 at 615). Our law does not deprive the defendant in a murder prosecution of due process of law. We also believe, for the reasons stated by Chief Judge Breitel in his concurring opinion, that the concept of affirmative defenses is sound, valuable and is one that has a place in modern penal law. We hold, therefore, that the provisions of the New York Penal Law which set forth the affirmative defense of extreme emotional disturbance are not constitutionally infirm.

The issue of whether Gordon Patterson's actions were committed under the influence of an extreme emotional disturbance was squarely presented to the jury. Although the People did not controvert the testimony of the defense psychiatrist, the jury was free to refuse to credit that testimony and to conclude, from the other evidence in the case, that the defendant had not established that his intent was formulated under the influence of an extreme mental trauma. The jury concluded that the defendant was not entitled to the mitigation permitted by statute and, on appeal to our court, from an affirmance by an intermediate appellate court, this finding is not reviewable by us. (See, e.g., *People* v. *Eisenberg*, 22 NY2d 99, 101.)

We turn now to the issue of whether Roberta Patterson, the defendant's wife, was properly permitted to testify as to the facts of the shooting and the conversation with the defendant during the ride from the scene of the crime. Although the Pattersons were, and are still, legally married to each other, the actions and words of the defendant were not protected by the marital privilege. (CPLR 4502.) Immediately after the shooting, the defendant attempted to strangle his wife. After releasing his grip

on her, he ordered her about with a rifle still clutched in his hands. "This is strong evidence that defendant himself was not then relying upon any confidential relationship to preserve the secrecy of his acts and words * * * * *" (*People* v. *Dudley*, 24 NY2d 410, 415.)

As to the other contentions advanced by the defendant, we find them to be without merit. Accordingly, the order of the Appellate Division should be affirmed.

BREITEL, Ch. J. (concurring):

I am in complete agreement with the views expressed in the majority opinion and therefore concur in it. It seems apt, however, to add some comments respecting the salutary criminological purposes served by the development of affirmative defenses, even where the burden of proof rests on the defendant.

A preliminary caveat is indicated. It would be an abuse of affirmative defenses, as it would be of presumptions in the criminal law, if the purpose or effect were to unhinge the procedural presumption of innocence which historically and constitutionally shields one charged with crime. Indeed, a by-product of such abuse might well be also to undermine the privilege against self-incrimination by in effect forcing a defendant in a criminal action to testify in his own behalf.

Nevertheless, although one should guard against such abuses, it may be misguised, out of excess caution, to forestall or discourage the use of affirmative defenses, where defendant may have the burden of proof but no greater than by a preponderance of the evidence. In the absence of affirmative defenses the impulse to legislators, especially in periods of concern about the rise of crime, would be to define particular crimes in unqualifiedly general terms, and leave only to sentence the

adjustment between offenses of lesser and greater degree. In times when there is also a retrogessive impulse in legislation to restrain courts by mandatory sentences, the evil would be compounded.

The affirmative defense, intelligently used, permits the gradation of offenses at the earlier stages of prosecution and certainly at the trial, and thus offers the opportunity to a defendant to allege or prove, if he can, the distinction between the offense charged and the mitigating circumstances which should ameliorate the degree or kind of offense. The instant homicide case is a good example. Absent the affirmative defense, the crime of murder or manslaughter could legislatively be defined simply to require an intent to kill, unaffected by the spontaneity with which that intent is formed or the provocative or mitigating circumstances which should legally or morally lower the grade of crime. The placing of the burden of proof on the defense, with a lower threshold, however, is fair because of defendant's knowledge or access to the evidence other than his own on the issue. To require the prosecution to negative the "element" of mitigating circumstances is generally unfair, especially since the conclusion that the negative of the circumstances is necessarily a product of definitional and therefore circular reasoning, and is easily avoided by the likely legislative practice mentioned earlier.

The problems involved and their resolution are, of course, not confined to the crimes of homicide but extend to most serious offenses and some minor ones.

In a more mature and developed criminology sophisticated distinctions should be used freely, guarding only for abuse. The goals are more appropriate definition of and sanctions for crime, and a retreat from primitive notions about crime based on a result alone or based largely on result. "A homicide is a

homicide is a homicide" is not a truth of modern criminology and such a simplistic approach, which could be encouraged by making affirmative defenses unattractive to legislators, is not one to be followed.

The treatment of entrapment as an affirmative defense in the Model Penal Code is particularly illustrative of the discussion (A.L.I. Model Penal Code, Tent. Draft No. 9 [1959], §2.10, subd [2] and Comments at pp 14-24). The trial was followed in this State with the enactment of the new Penal Law, to introduce what had not been in this State the ameliorative entrapment defense before (see §40.05, enacted as §35.40 by L. 1965, ch. 1030, and renumbered §40.05 by L. 1968, ch. 73, §11, with the burden of proof on defendant, §25.00, subd 2; *People* v. *Laietta*, 30 NY2d 68, 73-75, cert. den. 407 US 923). Given the resistance in many places in the Legislature and even in the American Law Institute it is a fair conjecture that but for the affirmative defense *cum* burden of proof treatment, the law would not have followed this course (see Hechtman, Practice Commentaries to Penal Law § 25.00, McKinney's Consol. Laws of N.Y., Book 39, at pp 62-63; A.L.I. Model Penal Code, Tent, Draft No. 4 [1955], Comments to § 1.13, at pp 108-114, esp. p 113). In short, only those with a lack of historical perspective would treat the affirmative defense as a hardening of attitudes in law enforcement rather than as a civilized and sophisticated amelioration.

In sum, the appropriate use of affirmative defenses enlarges the ameliorative aspects of a statutory scheme for the punishment of crime, rather than the other way around — a shift from primitive mechanical classifications based on the bare anti-social act and its consequences, rather than on the nature of the offender and the conditions which produce some degree of excuse for his conduct, the mark of an advanced criminology.

JONES, J. (concurring):

I concur in the majority opinion.

In my view respect for the proper role of the legislative branch calls for the exercise of responsible judicial constraint in this case. Our Legislature has carefully and thoughtfully revised our State's Penal Law. In that process recourse was had to the recasting as an affirmative defense of what is now termed "extreme emotional disturbance". As is stated in the concurring opinion of the Chief Judge, the intelligent use of affirmative defenses makes eminently sound sense in the criminal law today. Thus, I am not prepared in the discharge of what I conceive to be my judicial responsibility and discipline to strike down the provision here under review because on one analysis the opinion of the United States Supreme Court in *Mullaney* v *Wilbur*, 421 US 684, would appear to call for that result. Another reading of the same opinion leads others to a different conclusion. In that circumstance, I conclude that, until there has been an explicit determination by the Supreme Court which permits us no alternative, it serves better in this case to leave to that Court the articulation of its views than for me to assume to interpret them, particularly where experience has demonstrated that my own judgment in such matters is not infallible. (Cf. *People* v *La Ruffa*, 37 NY2d 58, 62 [my concurring opinion], cert. den. 44 USLW ——; *Menna* v *New York*, 44 USLW 3304.)

COOKE, J. (dissenting):

I dissent and vote to reverse the order of the Appellate Division and to grant a new trial, on the authority of *Mullaney* v *Wilbur* (421 US 684).

Defendant was indicted and convicted after a jury trial of the crime of murder. The indictment, returned on January 15,

1971, accused "the defendant of the crime of MURDER, committed as follows: The defendant on the 27th day of December, 1970, in the Town of Urbana, County of Steuben and State of New York, did knowingly and unlawfully and with the intent to cause the death of another person, did cause the death of another person, to wit: the defendant on the aforesaid date at the Robert Rook residence in the Town of Urbana, New York, did intentionally cause the death of John Northrup by intentionally firing at John Northrup a loaded firearm thereby inflicting wounds which caused the death of said John Northrup."

The pivotal question on which this appeal turns is whether or not the New York murder statute in effect at the time of the commission of the alleged crime and at the time of trial (Penal Law, §125.25, subd 1; see ch 1030, L 1965, eff Sept. 1, 1967), which made the defense of extreme emotional disturbance an affirmative defense, violated the due process clause of the Fourteenth Amendment.

Under the old Penal Law in effect prior to September 1, 1967, there were two degrees of murder, first degree murder being distinguished from murder in the second degree by the presence of premeditation and deliberation. Section 1044 of the former Penal Law, defining murder in the first degree, provided:

> The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:
>
> 1. From a deliberate and premeditated design to effect the death of the person killed, or of another;
>
> * * *

and section 1046, furnishing the second degree definition, stated:

> Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation.

The revised Penal Law, as originally enacted by chapter 1030 of the Laws of 1965 and which became effective September 1, 1967, not only abandoned the degrees of murder but also eliminated the elements of premeditation and deliberation. In this respect, homicidal intent alone became the prerequisite for murder (Rothblatt, Criminal Law of New York, The Revised Penal Law, §68).

Subdivision 1 of section 125.25 of the revised Penal Law, as in effect at the time in question,[1] provided in part:

> A person is guilty of murder when:
>
> 1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:
>
> (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; * * *.

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[1] Pursuant to section 4 of chapter 367 of the Laws of 1974, effective September 1, 1974, the words "in the second degree" were added to the section title, the introductory line and the last unnumbered paragraph of section 125.25. Pursuant to section 13 of chapter 276 of the Laws of 1973, effective September 1, 1973, "A-I" were substituted for "A". Pursuant to section 5 of chapter 367 of the Laws of 1974, effective September 1, 1974, section 125.27, entitled "Murder in the first degree", was added to the Penal Law.

It should be noted that the absence of extreme emotional disturbance is not one of the elements of this type of such a crime; rather, such a disturbance is made an affirmative defense. Under this statute murder is a class A felony punishable by life imprisonment (Penal Law, §70.00 [2] [a]).

Section 125.20 of the revised Penal Law, defining manslaughter in the first degree, reads in part:

> A person is guilty of manslaughter in the first degree when:
>
> * * *
>
> 2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; * * *.

Attention is called to the fact that under the statute the People need not prove "under the influence of extreme emotional disturbance" in any prosecution under subdivision 2 of section 125.20. Manslaughter in the first degree is defined as a class B felony, punishable by 25 years imprisonment (Penal Law, § 70.00 [2] [b].

The statute, subdivision 2 of section 25.00 of the Penal Law, declares in regard to the burden of proof as to an affirmative defense:

> When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has

> the burden of establishing such defense by a preponderance of the evidence.

Thus, under the statute, the defendant had the burden of establishing, by a preponderance of the evidence, the affirmative defense that he acted under the influence of extreme emotional disturbance. Here, the trial court charged that defendant had raised the affirmative defense of "extreme emotional disturbance" and read subdivision 2 of section 25.00 to the jury. It instructed the jury that:

> In this respect, the defendant's raising of an affirmative defense makes a slight variation; although the rule still stands, generally, as to proof of the whole case, the burden of proving his affirmative defense — that indeed his acts were under extreme emotional disturbance which appears, reasonably, to be an explanation or excuse — is placed upon the defendant himself. The District Attorney is not required to deny this excuse. The defendant must by his proof convince you both that he was so emotionally influenced, and that it is a reasonable explanation and excuse for what he did. But he need not prove it beyond a reasonable doubt, but merely by a preponderance of the evidence.

After this case was tried and subsequent to the Appellate Division affirmance, the Supreme Court, on June 9, 1975, rendered its decision in *Mullaney* v *Wilbur* (421 US 684). It is determinative here. It must be given complete retroactive effect, since the major purpose of its constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function (*Ivan V.* v *City of New York*, 407 US 203; cf. *United States ex rel. Castro* v *Regan*, 525 F2d 1157, 1158).

In *Mullaney*, defendant was found guilty of murder after a trial in the State of Maine. The case against him included his pretrial statement in which he claimed that he attacked the

victim in a frenzy provoked by the victim's homosexual advances. The defense argued that the homicide was not unlawful since defendant lacked criminal intent and, alternatively, that at most the homicide was manslaughter rather than murder since it occurred in the heat of passion provoked by the homosexual assault. The trial court instructed the jury that Maine law recognizes only two kinds of homicide, murder and manslaughter, the common elements of both being that the homicide be unlawful, that is, neither justifiable or excusable, and that it be intentional. After reading the statutory definitions of murder and manslaughter, the court charged that "malice aforethought is an essential and indispensable element of the crime of murder", without which the homicide would be manslaughter. The jury was further instructed that if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. It was emphasized that "malice aforethought and heat of passion on sudden provocation are inconsistent things" and, thus, by proving the latter the defendant would negate the former and reduce the homicide from murder to manslaughter.

The Maine murder statute (Me Rev State, Tit 17, §2651) provides:

> Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life.

The manslaughter statute (Tit 17, §2551), in relevant part, reads:

> Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought * * * shall be punished by

a fine of not more than $1,000 or by imprisonment for not more than 20 years * * *.

The Supreme Court in *Mullaney*, at page 691, viewed these Maine statutes in this fashion:

> The Maine law of homicide, as it bears on this case, can be stated succinctly: Absent justification or excuse, all intentional or criminally reckless killings are felonious homicides. Felonious homicide is punished as murder — *i.e.*, by life imprisonment — *unless the defendant proves by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation*, in which case it is punished as manslaughter — *i.e.*, by a fine not to exceed $1,000 or by imprisonment not to exceed 20 years (emphasis added).

After tracing the development of the law relating to homicide for several centuries and noting that in the last fifty years the large majority of the states have required the prosecution to prove the absence of the heat of passion on sudden provocation beyond a reasonable doubt, the Supreme Court observed at page 696:

> This historical review establishes two important points. First, the fact at issue here — the presence or absence of the heat of passion on sudden provocation — has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide. And, second, the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving this fact.

In response to the argument that because of the difficulties in negating an argument that the homicide was committed in the heat of passion the burden of proving this fact should rest on the defendant, the Supreme Court was quick to point out at page 701:

> No doubt this is often a heavy burden for the prosecution to satisfy. The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential.

After laying down these premises, it comes as no surprise that the Supreme Court terminated its *Mullaney* dissertation, at page 704, with this conclusion:

> We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.

That the New York statutes in question (Penal Law, §§125.20 [subd 2]; 125.25 [subd 1]) are virtually the same as the Maine law of homicide, is apparent from the Supreme Court's "succinct statement" of the latter in *Mullaney* at page 691. New York's phrase of "under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse" is but a replacement for the phrase "in the heat of passion". This is demonstrated by Hechtman's Practice Commentaries (McKinney's Cons. Laws, Book 39, §125.20, pp 391, 393) in which it is stated *inter alia*:

> The meanings and significance of subdivisions 1 and 2 can be fully appreciated only against a background of certain common law principles of homicide.
>
> The common law enunciates the seemingly sound doctrine, known as "voluntary manslaughter" and adopted in most American jurisdictions, that murder by intentional killing is reduced to manslaughter by a mitigating factor variously termed "heat of passion," "sudden passion," "provocation," and the like (1 Warren on Homicide [Perm. Ed.] §85, pp. 416-417). The theory of the principle is one of extending a degree

> of mercy to a defendant who, though intending to kill, acted out of some kind of emotional disturbance rather than in cold blood.
>
> * * *

Subdivision 2, in conjunction with a provision of the revised murder statute (§125.25 [1a]), restores to New York the aforementioned common law doctrine of reduction from murder to manslaughter on the basis of "heat of passion." In the restoration process, however, the phrase "in the heat of passion" is abandoned as the criterion of mitigation in favor of the phrase, "under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse" (§125.25 [1a]). The latter standard is adopted from the Model Penal Code of the American Law Institute (§210.3 [b]), and the reasons prompting this change are fully expounded in the Institute's commentaries (Model Penal Code Commentary, Tent Draft No. 9, pp. 28-29).

Moreover, as the Supreme Court pointed out in *Mullaney*, the "malice aforethought" specified in Maine's murder statute was not an element requiring objective proof but only a policy presumption of the absence of heat of passion (Id. at 694). While New York's statutes do not mention malice as such, they make the absence of extreme emotional distress an element of murder by distinguishing manslaughter from murder only by the presence of extreme emotional distress. Thus nothing turns on the fact that Maine gives this absence of the emotional factor a name and New York does not. Although not an element of the crime, said absence is the sole factor which determines whether the defendant will be convicted of murder or manslaughter and whether he will be subject to a maximum sentence of life or 25 years imprisonment. Functionally, the two statutory schemes are identical. The Supreme Court said of this design that it would permit a state to:

> undermine many of the interests that decision [*Winship*] sought to protect without effecting any substantive

> *change in the law. It* would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. (421 US at 698.)

Under *Mullaney*, there is no alternative but to hold that the provision in subdivision 1 of section 125.25 of the Penal Law, which makes the contention that defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse an affirmative defense, with the burden of proof upon defendant to establish said defense by a preponderance of the evidence, unconstitutional as a violation of the due process provision of the Fourteenth Amendment. The record here, relating to defendant's mental state at the time of the killing, required a charge that to establish defendant's guilt of murder the prosecution had the burden of proving that defendant was not acting under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse. In *United States ex rel. Castro* v *Regan* (525 F2d 1157, *supra*), it was stated at page 1160:

> No where did the court charge, as did the Maine court in *Mullaney*, that the defendant had the burden of "establish[ing] by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter." * * * Rather, the court charged that, before the jury could find murder in the second degree, "there has to be proof beyond a reasonable doubt that there was the unlawful killing of another human being with malice and without reasonable provocation or justifiable cause or excuse."

Under such a charge, defendant had nothing to prove and the burden was kept where it belonged.

See: *People* v *Davis* (49 AD2d 437); *People* v *Woods* (84 Misc2d 301; *People* v *Balogun* (82 Misc2d 907). See also, *Evans* v *State* (28 Md App 640).

Opinion of The New York Court of Appeals

It is significant that, although the Appellate Division affirmed the judgment of conviction in this case before the Supreme Court handed down its decision in *Mullaney*, that same Appellate Division, creditably, changed its position in *People* v *Davis* (*supra*) when that case came to it after *Mullaney*.

The order of the Appellate Division should be reversed and a new trial granted.

* * * * * * * *

Order affirmed. Opinion by Jasen, J. Concur: Breitel, Ch. J., Gabrielli and Jones, JJ., Breitel, Ch. J., and Jones, J., in separate concurring opinions. Cooke, J., dissents and votes to reverse in an opinion in which Wachtler and Fuchsberg, JJ., concur.

Decided April 1, 1976

APPENDIX B

REMITTITUR

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 15th day of January in the year of our Lord one thousand nine hundred and seventy-six, before the Judges of said Court.

WITNESS,

The HON. CHARLES D. BREITEL,
Chief Judge, *Presiding.*

JOSEPH W. BELLACOSA, Clerk

REMITTITUR April 1, 1976

4 No.

The People &c.,

Respondent,

vs.

Gordon G. Patterson, Jr.,

Appellant.

Be it Remembered, That on the 28th day of November in the year of our Lord one thousand nine hundred and seventy-five, Gordon G. Patterson, Jr., the appellant in this cause, came here unto the Court of Appeals, by Betty D. Friedlander, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And the

Remittitur

People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by John M. Finnerty, Dist. Atty. for Steuben County, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Therefore, it is considered that the said order is affirmed &c., AS AFORESAID.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Steuben County Court before the Judge thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Steuben County Court before the Judge thereof, &c.

/s/ JOSEPH W. BELLACOSA
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, April 1, 1976.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

/s/ JOSEPH W. BELLACOSA
Clerk.

Whereupon, The said Court of Appeals having heard this cause argued by Ms. Betty D. Friedlander of counsel for the appellant, and by Mr. John M. Finnerty of counsel for the respondent, and after due deliberation had thereon, did order

Remittitur

and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed. Opinion by Jasen, J. Concur: Breitel, Ch. J., Gabrielli and Jones, JJ. Breitel, Ch. J., and Jones, J., in separate concurring opinions. Cooke, J., dissents and votes to reverse in an opinion in which Wachtler and Fuchsberg, JJ., concur.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Steuben County Court there to be proceeded upon according to law.

State of New York
County of Steuben ss:

I, Chilton Latham, Clerk of the County of Steuben, and also Clerk of the County and Supreme Courts therein, both being Courts of Record, having a common seal, do hereby certify that I have compared the foregoing copy of Remittitur with the original of the same now remaining in my office and that it is a correct transcript therefrom and the whole of said original.

In testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Courts, at Bath, N.Y., this 20th day of April A.D., 1976.

/s/ CHILTON LATHAM
Clerk

(SEAL)

ORDER OF HON. M.E. TILLMAN

Index No. 30,538

FILED
May 17 1:40 PM '76
STEUBEN COUNTY
CLERK'S OFFICE

STATE OF NEW YORK
COUNTY COURT: COUNTY OF STEUBEN

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

against

GORDON G. PATTERSON,

Defendant.

Present: Hon. M.E. Tillman, Acting County Court Judge

The above-mentioned defendant having appealed to the Court of Appeals from the order of the Appellate Division of this court, Fourth Department, entered on the 18th day of May, 1973 in the office of the clerk of such court, and the Court of Appeals having heard said appeal and ordered and adjudged that the order so appealed from be affirmed, and judgment entered against the defendant, and the remittitur from the Court of Appeals having been filed in the office of the clerk of Steuben County,

NOW, on motion of Betty D. Friedlander, Esq., attorney for the defendant, it is

ORDERED that the said judgment of the Court of Appeals be, and the same hereby is made the judgment of this court, and that the judgment entered herein on the 6th day of July, 1971,

Judgment

be, and the same hereby is affirmed, and that a judgment of this court be entered herein affirming said judgment.

Signed this 11th day of May, 1976 at Corning, New York.

Enter

/s/ M.E. TILLMAN
Acting County Court Judge
Steuben County

ENTERED
MAY 17 1:40 PM '76
STEUBEN COUNTY
CLERK'S OFFICE

JUDGMENT

STATE OF NEW YORK
COUNTY COURT: COUNTY OF STEUBEN

PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs

against

GORDON G. PATTERSON,

Defendant.

The above-named defendant having appealed to the Court of Appeals from an order of the Appellate Division of this court, Fourth Judicial Department, entered in this action on the 18th day of May, 1973, affirming the judgment entered therein on the 6th day of July, 1971, in the office of the clerk of Steuben County, and the Court of Appeals having heard said appeal, and ordered and adjudged that the order so appealed from be af-

Judgment

firmed and judgment rendered against the defendant, and the remittitur from the Court of Appeals having been filed in the office of the clerk of Steuben County, and an order having been entered thereon making the judgment of the Court of Appeals the judgment of this court, and directing the entry of a judgment of affirmance herein,

Now, on motion of Betty D. Friedlander, Esq., attorney for defendant,

It is adjudged that the judgment in this action entered on the 6th day of July, 1971, be and the same hereby is affirmed, and that the defendant be found guilty of the crime of murder.

Judgment signed this 17th day of May, 1976.

/s/ CHILTON LATHAM
Clerk, Steuben County

State of New York
County of Steuben ss:

I, Chilton Latham, Clerk of the County of Steuben, and also Clerk of the County and Supreme Courts therein, both being Courts of Record, having a common seal, do hereby certify that I have compared the foregoing copy of Order with the original of the same now remaining in my office and that it is a correct transcript therefrom and the whole of said original.

In testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Courts, at Bath, N.Y., this 17th day of May A.D., 1976.

/s/ CHILTON LATHAM, Clerk

(SEAL)

APPENDIX C

NOTICE OF APPEAL

STATE OF NEW YORK
COUNTY COURT: COUNTY OF STEUBEN

GORDON G. PATTERSON, JR.,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

Indictment No. 3273

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Gordon G. Patterson, Jr., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the New York Court of Appeals, entered on April 1, 1976, affirming the order of the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, entered on May 18, 1973, affirming the judgment of conviction of murder, entered in the Steuben County Court on July 6, 1971.

This appeal is taken pursuant to 28 U.S.C.A. §1257, subparagraph (2).

DATED: May 25, 1976

/s/ BETTY D. FRIEDLANDER
Office and P.O. Address
The Clinton House
103 West Seneca Street
Ithaca, New York 14850
Phone: 607—273-2156

Notice of Appeal

VICTOR J. RUBINO
Office and P.O. Address
280 Park Avenue
New York, New York 10017
Phone: 212—697-6800

Counsel for Appellant.

TO: Hon. John M. Finnerty
District Attorney
Steuben County
Bath, New York

Chilton Latham, Clerk
Steuben County Clerk's Office
Bath, New York

Hon. Louis J. Lefkowitz
New York State Attorney General
The Capitol
Albany, New York 12224

Hon. Joseph Bellacosa, Clerk
Court of Appeals
Court of Appeals Hall
Eagle Street
Albany, New York 12207

CERTIFICATE OF SERVICE OMITTED IN PRINTING

APPENDIX D

STATUTES INVOLVED

The full verbatim text of the State statutes involved follows:

§ 25.00 Defenses; burden of proof

1. When a "defense," other than an "affirmative defense," defined by statute is raised at a trial, the people have the burden of disproving such defense beyond a reasonable doubt.

2. When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence.

Book 39, McKinney's Cons. Laws of New York (1975) Penal Law p. 62.

§ 70.00 Sentence of imprisonment for felony

1. Indeterminate sentence. Except as provided in subdivision four, a sentence of imprisonment for a felony shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.

2. Maximum term of sentence. The maximum term of an indeterminate sentence shall be at least three years and the term shall be fixed as follows:

(a) For a class A felony, the term shall be life imprisonment;

(b) For a class B felony, the term shall be fixed by the court, and shall not exceed twenty-five years;

(c) For a class C felony, the term shall be fixed by the court, and shall not exceed fifteen years;

(d) For a class D felony, the term shall be fixed by the court, and shall not exceed seven years; and

(e) For a class E felony, the term shall be fixed by the court, and shall not exceed four years.

3. Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence shall be at least one year and shall be fixed as follows:

(a) In the case of a class A felony, the minimum period shall be fixed by the court and specified in the sentence. *

(i) For a class A-I felony, such minimum period shall not be less than fifteen years nor more than twenty-five years.

(ii) For a class A-II felony, such minimum period shall not be less than six years nor more than eight years four months.

(iii) For a class A-III felony such minimum period shall not be less than one year nor more than eight years four months;

(b) Where the sentence is for a class B, class C or class D felony and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that the ends of justice and best interests of the public require that the court fix a minimum period of imprisonment, the court may fix the

*Pursuant to chapter 276 of the Laws of 1973, effective 9/1/73, the words "For a class A-I Felony" were inserted as subparagraph (i) in paragraph (a) of Subdivision 3, and subparagraphs (ii) and (iii) were added. This works no change in the punishment for conviction under Penal Law, Section 125.25 as it existed when Appellant was convicted in 1971.

minimum period. In such event, the minimum period shall be specified in the sentence and shall not be more than one-third of the maximum term imposed. When the minimum period of imprisonment is fixed pursuant to this paragraph, the court shall set forth in the record the reasons for its action; and

(c) In any other case, the minimum period of imprisonment shall be fixed by the state board of parole in accordance with the provisions of the correction law.

4. Alternative definite sentence for class D or E felony. When a person, other than a second or persistent felony offender, is sentenced for a class D or class E felony and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less.

Book 39, McKinney's Cons. Laws of New York (1975) Penal Law pp. 194-196.

§ 125.00 Homicide defined

Homicide means conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks under circumstances constituting murder, manslaughter in the first degree, manslaughter in the second degree, criminally negligent homicide, abortion in the first degree or self-abortion in the first degree.

Book 39, McKinney's Cons. Laws of New York (1975) Penal Law p. 370.

Statutes Involved

§ 125.20 Manslaughter in the first degree

A person is guilty of manslaughter in the first degree when:

1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; or

3. He commits upon a female pregnant for more than twenty-four weeks an abortional act which causes her death, unless such abortional act is justifiable pursuant to subdivision three of section 125.05.

Manslaughter in the first degree is a class B felony.

Book 39, McKinney's Cons. Laws of New York (1975) Penal Law pp. 390, 391.

Statutes Involved

§ 125.25 Murder in the second degree *

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime; or

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates

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*Pursuant to section 4 of chapter 367 of the Laws of 1974, effective September 1, 1974, the words "in the second degree" were added to the section title, the introductory line and the last unnumbered paragraph of section 125.25. Pursuant to section 13 of chapter 276 of the Laws of 1973, effective September 1, 1973, "A-1" were substituted for "A". Pursuant to section 5 of chapter 367 of the Laws of 1974, effective September 1, 1974, section 125.27, entitled "Murder in the first degree", was added to the Penal Law. These changes were made after Appellant's conviction in 1971, but the majority opinion in the Court of Appeals stated explicitly that there were no substantive changes in the relevant statutes (A.13 F.N.6)

a grave risk of death to another person, and thereby causes the death of another person; or

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

Murder in the second degree is a class A-I felony.

Book 39, McKinney's Cons. Laws of New York (1975) Penal Law pp. 396-398.